IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

JOSHUA CHEEK,

Plaintiff,

OPINION AND ORDER

13-cv-527-bbc

v.

JEN BEEMAN,
MENDOTA HOSPITAL,
CLAIR KRUGER, SARA CONKLIN,
GREG VANRIVBRECK and HEATHER,

Defendants.

- -

Pro se plaintiff Joshua Cheek has filed a proposed complaint in which he asserts claims against the Mendota Mental Health Institute and its employees. Dkt. #1. At the time of his filing, plaintiff was detained at the Mendota Mental Health Institute following a criminal adjudication. He has since been transferred to the Dodge Correctional Institution. Plaintiff is proceeding in forma pauperis under 28 U.S.C. § 1915 and has made an initial partial payment of the filing fee.

The August 8, 2013 order, dkt. #6, said that plaintiff was subject to the Prison Litigation Reform Act, 28 U.S.C. § 1915A, but, upon further reflection, I see that this matter is not so clear cut. The PLRA applies only to "prisoners," defined as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole,

probation, pretrial release, or diversionary program." 28 U.S.C. § 1915A(c).

At the time of filing, plaintiff was detained at the Mendota Mental Health Institute pursuant to a criminal proceeding in which he was adjudged "guilty but not guilty due to mental disease/defect." Wisconsin v. Cheek, Winnebago County Case No. 2010CF000182, Wis. Circuit Court Access. See also Wis. Stat. § 971.06 ("The [not guilty by reason of mental disease or defect] plea may be joined with a plea of not guilty. If it is not so joined, this plea admits that but for lack of mental capacity the defendant committed all the essential elements of the offense charged in the indictment, information or complaint."). It is not clear whether plaintiff was "convicted" in this proceeding. Compare Kolocotronis v. Morgan, 247 F.3d 726, 728 (8th Cir. 2001) (holding that a patient was not subject to the PLRA when he had been adjudged not guilty of a criminal charge by reason of insanity) with Magnuson v. Arizona State Hospital, 2010 WL 283128 (D. Ariz. Jan. 20, 2010) (holding that where "plaintiff entered a plea of 'guilty except insane,'" he "is a 'prisoner' within the meaning of the PLRA"). Cf. Page v. Torrey, 201 F.3d 1136, 1139 (9th Cir. 2000) (plaintiff who is civilly committed under a sexually violent predator act is not a prisoner under the PLRA); Troville v. Venz, 303 F.3d 1256, 1260 (11th Cir. 2002) (same); Michau v. Charleston County., S.C., 434 F.3d 725, 727 (4th Cir. 2006) (same).

At this point, it does not matter whether the PLRA applies to plaintiff because whether plaintiff is considered a "prisoner" or a patient, he may be required to pay an initial partial payment (which he has done). Longbehn v. United States, 169 F.3d 1082, 1083 (7th Cir. 1999) ("Partial-payment requirements remain appropriate even when the PLRA does

not apply . . . . "). Since plaintiff has not paid a full filing fee, I must screen his complaint whether or not he is a "prisoner." 28 U.S.C. § 1915(e)(2). The standard for screening complaints by prisoners or by plaintiffs proceeding in forma pauperis is effectively the same: whether the complaint is legally frivolous, malicious, fails to state a claim upon which relief may be granted or asks for money damages from a defendant who by law cannot be sued for money damages. 28 U.S.C. §§ 1915(e)(2), 1915A. Finally, in addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. Haines v. Kerner, 404 U.S. 519, 521 (1972).

Consequently, I will screen plaintiff's complaint without determining whether he is a "prisoner," but should plaintiff's custodial status become an issue in this litigation, such as in a failure-to-exhaust motion, I will ask both sides to submit briefs on whether plaintiff is a "prisoner" under the PLRA.

In screening plaintiff's complaint, I construe the facts stated in the complaint as true.

ALLEGATIONS OF FACT

On August 28, 2012, plaintiff was bit by Jen Beeman, who appears to be an employee of the Mendota Mental Health Institute, when other staff were restraining plaintiff. He alleges that after the incident employees Clair Kruger, Sara Conklin and Heather did not allow him to report the incident to the facility for six months and when he was allowed to report it, Sara Conklin told him that too much time had elapsed since the incident. Plaintiff says he then tried to file this case in small claims court but was denied, so he is filing his case

in this court. Plaintiff seeks $500,000 in damages.

OPINION

My review of plaintiff's complaint reveals that he is attempting to state two claims: (1) an excessive force claim for the bite and (2) a due process claim for the Mendota Mental Health Institution employees' failure to allow him to report the biting incident within the institution.

Just as it is not clear whether plaintiff is subject to the PLRA, it is unclear whether, as a person detained in a mental health institute following a criminal adjudication, plaintiff is a "convicted" person for the purposes of the Eighth Amendment's protection against cruel and unusual punishment. Smentek v. Dart, 683 F.3d 373, 374 (7th Cir. 2012) ("[T]he cruel and unusual punishments clause does not apply to persons who though incarcerated have not been convicted and so are not being subjected to 'punishment.'"). If not, he still receives roughly equivalent protection against excessive force under the due process clause of the Fourteenth Amendment. Id. ("[T]he due process clause has been interpreted to provide equivalent protection [to the Eighth Amendment]."); Wilson v. Williams, 83 F.3d 870, 875 (7th Cir. 1996).

In determining whether someone has used excessive force against a prisoner under the Eighth Amendment, the question is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Whitley v. Albers, 475 U.S. 312, 320 (1986). The factors relevant to making this

determination include:

- the need for the application of force
- the relationship between the need and the amount of force that was used
- the extent of injury inflicted
- the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them
- any efforts made to temper the severity of a forceful response

Id. at 321. Under the Fourteenth Amendment, the question is whether defendant's actions amount to "a deliberate act intended to chastise or deter" or at least "reckless disregard for [plaintiff's] rights." Wilson, 83 F.3d at 875 (citations omitted).

Although the facts surrounding plaintiff's restraint are not alleged in his complaint, plaintiff's allegation that an employee bit him is enough to state a claim for excessive force against Jen Beeman under either the Eighth Amendment or the Fourteenth Amendment.

However, plaintiff brings his constitutional claims via 42 U.S.C. § 1983, and plaintiff cannot bring these claims against the Mendota Mental Health Institute because it is not a "person" under § 1983. Will v. Michigan Department of State Police, 491 U.S. 58, 65-71 (1989). Accordingly, plaintiff's excessive force claim against Jen Beeman may proceed, but I must dismiss his claim against "Mendota Hospital."

Next, I understand plaintiff to be alleging that the other defendants violated his due process rights when they interfered with his filing a report of the biting incident with the Mendota Mental Health Institute. Although plaintiff states that he was transferred to a different ward within the Institute around the time of the biting incident, he does not

indicate that this transfer was in retaliation to his attempt to file a report. Moreover, plaintiff does not allege that defendants prevented him from gaining access to the courts or filing this suit. Although plaintiff has a right to seek relief from the courts and has a right against retaliation for gaining access to grievance procedures, he does not have the right to use a grievance or reporting procedure within the hospital or prison system in which he is detained. Owens v. Hinsley, 635 F.3d 950, 953 (7th Cir. 2011) ("Prison grievance procedures are not mandated by the First Amendment and do not by their very existence create interests protected by the Due Process Clause, and so the alleged mishandling of [plaintiff's] grievances by persons who otherwise did not cause or participate in the underlying conduct states no claim."). Consequently, plaintiff has not stated a claim upon which relief may be granted, and I must dismiss his due process claim.

In addition, it appears that this is the only claim that plaintiff asserts against defendants other than Jen Beeman. Plaintiff also does not mention defendant Greg Vanrivbreck in his complaint and thus does not state a claim against him. Therefore, I am dismissing defendants Clair Kruger, Sara Conklin, Greg Vanrivbreck and Heather from this case.

Finally, plaintiff has sent the court a letter that I construe as a motion requesting the court to direct the Mendota Mental Health Institute to allow plaintiff to receive his mail and to stop interfering with his mail delivery. Dkt. #8. However, plaintiff does not support his motion with any evidence that the Mendota Mental Health Institute or its employees are tampering with his mail and thus far he has been able to proceed with this case without any

apparent problem. Furthermore, plaintiff no longer resides at the Mendota Mental Health Institute; thus an order on this motion would be moot. Accordingly, I am denying plaintiff's motion.

ORDER

IT IS ORDERED that

1. Plaintiff Joshua Cheek is GRANTED leave to proceed on his excessive force claim against defendant Jen Beeman, dkt. #1.

2. Plaintiff's due process claim about interference with his reporting of the biting incident, dkt. #1, is DISMISSED.

3. The complaint is DISMISSED against defendants Mendota Hospital, Clair Kruger, Sara Conklin, Greg Vanrivbreck and Heather.

4. For the time being, plaintiff must send defendant a copy of every paper or document that he files with the court. Once plaintiff learns the name of the lawyer who will be representing defendant, he should serve the lawyer directly rather than defendant. The court will disregard documents plaintiff submits that do not show on the court's copy that he has sent a copy to defendant or to defendant's attorney.

5. Plaintiff should keep a copy of all documents for his own files. If he is unable to use a photocopy machine, he may send out identical handwritten or typed copies of his documents.

6. Pursuant to an informal service agreement between the Wisconsin Department

of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on defendant. Plaintiff should not attempt to serve defendant on his own at this time. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiff's complaint if it accepts service for defendant.

7. Plaintiff is obligated to pay the unpaid balance of his filing fees in monthly payments as described in 28 U.S.C. § 1915(b)(2). The clerk of court is directed to send a letter to the warden of plaintiff's institution informing the warden of the obligation under Lucien v. DeTella, 141 F.3d 773 (7th Cir. 1998), to deduct payments from plaintiff's trust fund accounts until the filing fee has been paid in full.

Entered this 30th day of October, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge